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## **Rule 12. Defenses And Objections; When And How Presented; By Pleading Or Motion; Motion For Judgment On The Pleadings.**

### **(a) When Presented.**

(1) A defendant shall file his or her answer within 30 days after the service of summons and complaint upon him or her. A defendant served under Rule 4(f) shall file an answer within 30 days from the date of first publication of the warning order. A defendant incarcerated in any jail, penitentiary, or other correctional facility in this state, however, shall file an answer within 60 days after service. A party served with a pleading stating a cross-claim or counterclaim against him or her shall file an answer or reply thereto within 30 days after service upon the party. The court may, upon motion of a party, extend the time for filing any responsive pleading.

(2) The filing of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within 10 days after notice of the court's action;

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within 10 days after service of the more definite statement. Provided, that nothing herein contained shall prevent a defendant summoned in accordance with Rule 4(f) from being allowed, at any time before judgment, to appear and defend the action; and, upon a substantial defense being disclosed, from being allowed a reasonable time to prepare for trial.

(3) When any case is removed to federal court and subsequently remanded, the plaintiff shall file a certified copy of the order of remand with the clerk of the circuit court and shall forthwith give written notice of such filing to all parties in accordance with Rule 5. Any adverse party shall have 30 days from the receipt of such notice within which to file an answer or a motion permitted under this rule.

**(b) How Presented.** Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion:

- (1) lack of jurisdiction over the subject matter,
- (2) lack of jurisdiction over the person,

(3) improper venue,  
(4) insufficiency of process,  
(5) insufficiency of service of process,  
(6) failure to state facts upon which relief can be granted,  
(7) failure to join a party under Rule 19,  
(8) pendency of another action between the same parties arising out of the same transaction or occurrence. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(8) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion is directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule, but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds therein stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or pendency of another action between the same parties arising out of the same transaction or occurrence is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in the original responsive pleading. Objection to venue may be made, however, if the action is dismissed or discontinued as to a defendant upon whose presence venue depends.

(2) A defense of failure to state facts upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. The defense of lack of jurisdiction over the subject matter is never waived and may be raised at any time.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. Upon a determination that venue is improper, the court shall dismiss the action or direct that it be transferred to a county where venue would be proper, with the plaintiff having an election if the action could be maintained in more than one county.

(i) Response to Motions; Reply. Any response in opposition to a motion under this rule and any reply to such a response shall be made as provided in Rules 6(c) and 7(b).

(j) Further Pleading. Attorneys will be notified of action taken by the court under this rule, and, if appropriate, the court will designate a certain number of days in which a party is to be given to plead further.

Reporter's Notes to Rule 12: - 1. Rule 12(a) is a revised and condensed version of FRCP 12(a). Its purpose is to prescribe the mechanics and timetable for filing responsive pleadings. Its substance is substantially the same as the Federal Rule.

2. The times prescribed in Section (a) for filing responsive pleadings are taken in part from the Federal Rule and in part from prior Arkansas law. Superseded Ark. Stat. Ann. 27-1135 (Repl. 1962) provided that a defendant must plead to a complaint or cross-complaint on the first day after the expiration of twenty days where service was made inside this State and thirty days where service was made outside the State. Thus, a defendant had twenty-one or thirty-one days within which to file a response depending upon where service was effected. Under Section (a), the "extra" day for filing a response is eliminated.

3. This rule allows a nonresident of this State a period of thirty days to plead regardless of where service was effected and regardless of whether service was effected through a resident agent in this State.

4. Where a defendant is served by warning order, the thirty day period commences upon the date of the first publication of the warning order. This compares with superseded Ark. Stat.

Ann. 27-1135 (3) (Repl. 1962) which provided that an appearance must have been made after thirty days had elapsed from the making of the warning order and appointment of the attorney ad litem.

5. Rule 12 substitutes the word "file" for serve and requires that the responsive pleading be filed within the time prescribed by this rule as opposed to serving the pleading as is the case under FRCP 12. By using this terminology, it is believed that arguments can be avoided as to when a pleading was served. 5 [6]. Section (a) follows the Federal Rule and superseded Ark. Stat. Ann. 27-1135 and 27-1137 (Repl. 1962) by allowing a period of twenty days within which to file a responsive pleading to a cross-claim or counterclaim.

6 [7]. Section (a) follows the Federal Rule by permitting the trial court to extend the time for filing any responsive pleading. This is in accord with prior Arkansas practice.

7 [8]. Section (b) sets forth the defenses which may be raised by motion prior to filing a responsive pleading. These defenses are essentially the same as those previously raised by motions to quash service and demurrers. This section is identical to Section (b) of the Federal Rule with the exception of the addition of (b)(8) which is a defense previously allowed under Ark. Stat. Ann. 27-1115 (3) (Repl. 1962). One important feature of this section is that it abolishes the distinction between general and special appearances; thus, it is not (is not) necessary to make a special appearance in order to challenge the jurisdiction of the person, process or venue. *Blank v. Bitker*, 135 F. 2d 962 (C.C.A. 7th, 1943); *Product Promotions, Inc. v. Cousteau*, 495 F. 2d 483 (C.C.A. 5th, 1974). 10 [9]. Sections (c) through (h) track FRCP 12(c) through (h) with the exception that Section (h)(1) takes into account the additional defense designed as (8) in 12(b) relating to the pendency of another action between the parties.

Additions to Reporter's Notes, 1984 Amendments: - Rule 12(h)(1) is amended to make it clear that the stated "waivable" defenses must be raised by motion pursuant to this rule or in the first responsive pleading or they are waived. The final sentence in this subsection excepts the objection to venue in the circumstances described in Ark. Stat. Ann. 27-614 (Repl. 1979), which is now superseded.

Addition to Reporter's Notes, 1987 Amendment: - Two new sections, based on provisions of the Uniform Rules for Circuit and Chancery [Chancery] Courts, have been added to Rule 12 in the interest of clarity and simplification. New section (i), which sets forth the time in which responses to motions must be filed, as well as the time period for the movants to file replies, tracks Uniform Rule 2(c) and (d). Though this requirement is also found in Rule 78(b) of the Rules of Civil Procedure, it is repeated here in a more conspicuous manner to assist users of the Rules. New section (j), borrowed from Rule 2(f) of the Uniform Rules, simply states that the court is to specify the time in which further pleading is allowed in the event the court grants a motion to dismiss and the deficiency can be remedied. These new provisions do not alter prior Arkansas practice.

Addition to Reporter's Notes, 1997 Amendment: - Paragraph (3) of subdivision (h) has been amended by adding a new sentence authorizing the court to transfer the case in the event that venue is improper. Rather than dismiss the action, the court may transfer it to any county where venue would be proper, with the plaintiff having an election if venue would lie in more than one county. The revised provision is generally consistent with Arkansas case law and the practice in the federal courts. See *Terminal Oil Co. v. Gautney*, 202 Ark. 748, 152 S.W.2d 309 (1941); *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989); 28 U.S.C. 1406(a).

Addition to Reporter's Notes, 2000 Amendment: - The second sentence of subdivision (h)(3) has been amended by replacing the introductory phrase "whenever it appears" with "upon a

determination." This change eliminates the unintended suggestion in the original version of the sentence that a motion to dismiss for improper venue, like a motion to dismiss for lack of subject matter jurisdiction, can be made at any time. As subdivision (h)(1) of the rule makes plain, improper venue is a waivable defense.

Addition to Reporter's Notes, [February] 2001 Amendment: - As adopted in 1987, the first sentence of subdivision (i) referred to "a motion made under this or any other rule." The words "or any other" have been deleted because of the 2001 amendment to Rule 56(c) establishing time frames for summary judgment motions and responses. Other motions are covered by Rule 78(b).

Addition to Reporter's Notes, [May] 2001 Amendment: - Paragraph (3) of subdivision (h) has been amended to reflect Constitutional Amendment 80, under which the circuit court is the single court of general jurisdiction in the state. A clause in the first sentence providing for transfer in the event that the court lacks subject matter jurisdiction has been deleted because there are no longer separate circuit, chancery, and probate courts. Left intact, however, is language directing the court to dismiss the action whenever it appears that subject matter jurisdiction is lacking. This provision comes into play when, for instance, the Constitution assigns original jurisdiction to another court. By way of example, the Supreme Court has original jurisdiction to determine the sufficiency of state initiative and referendum petitions and proposed constitutional amendments. Furthermore, while state courts generally have concurrent jurisdiction with the federal courts to decide cases arising under federal law, state courts are without subject matter jurisdiction if Congress has made federal jurisdiction exclusive. See, e.g., 28 U.S.C. 1338(a) (patent and copyright cases).

Addition to Reporter's Notes, 2002 Amendment: - Subdivision (i) of the rule previously included time periods for serving responses to motions and replies to responses. These matters are now governed by Rule 6(c), and subdivision (i) has been amended to provide a cross-reference to that provision. There has also been added a cross-reference to Rule 7(b), which governs the content of motions, responses, and replies.

Addition to Reporter's Notes, 2003 Amendment: - Under revised subdivision (a), a person "incarcerated in any jail, penitentiary, or other correctional facility in this state" has 30 days in which to respond to a complaint. This additional time helps ensure that such a defendant has an opportunity to obtain counsel and to be heard in the action. Subdivision (h)(2) has been amended to provide that the defense of lack of subject matter jurisdiction is never waived and may be asserted at any time. The new sentence simply restates settled law.

Addition to Reporter's Notes, 2004 amendment: - Subdivision (a) has been divided into three paragraphs and other stylistic changes made. The two departures from prior law appear in what are now paragraphs (1) and (3). Under the first paragraph, the time for an incarcerated defendant to file an answer has been increased from 30 days to 60 days. This change recognizes the role of prison employees under Rule 4(d)(4) in delivering the summons and complaint, the possibility that delays in such delivery may occur, and the likelihood that securing legal representation will take longer for incarcerated persons than for other defendants. Paragraph (3) deals with an issue previously covered in Rule 55(f), i.e., the time period for responding to a complaint after a federal court has remanded a removed case to state court. The new paragraph expands that period from 10 to 20 days and states more clearly the point at which the time begins to run. See *NCS Healthcare v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002). Because of new language in Rule 55(f), a defendant who filed an answer or Rule 12 motion in federal court while the case was pending there need

not, following remand, take the same action in state court within the 20- day grace period to avoid a default judgment. See Addition to Reporter's Notes to Rule 55 (2004 amendment).

Addition to Reporter's Notes, 2011 Amendment: Subdivision (a)(1) has been amended to require that both resident and nonresident defendants file a response within 30 days after service of the summons and complaint. The rule previously required that the resident defendant file the response within 20 days. On occasion the different response times led to the issuance of an incorrect summons by the clerk's office and subsequent issues as to the sufficiency of process. In addition, modern means of communication and electronic transmission diminish the need to distinguish between response times for resident and nonresident defendants. The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant must respond to a complaint when a case is remanded from federal court. Subdivision 12(f) similarly is amended to require that a motion to strike be filed within 30 days of service of the pleading upon a party.

### **History Text:**

History. Amended July 9, 1984, effective September 1, 1984; amended July 6, 1987, effective September 21, 1987; amended November 18, 1996, effective March 1, 1997; amended January 27, 2000; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended January 24, 2002; amended March 13, 2003; amended January 22, 2004; amended June 2, 2011, effective July 1, 2011.

### **Associated Court Rules:**

Rules of Civil Procedure

### **Group Title:**

III. Pleadings and Motions

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